UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC	)	
AND ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-271-LA-3
	)	
(Vermont Yankee Nuclear Power Station)	)	

NRC STAFF'S ANSWER TO THE STATE OF VERMONT'S MOTION FOR LEAVE TO FILE NEW AND AMENDED CONTENTIONS

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July 31, 2015

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INTRODUCTION

Pursuant to 10 C.F.R. § 2.309(i)(1), the U.S. Nuclear Regulatory Commission (NRC) staff (Staff) files this answer opposing the motion for leave to file new and amended contentions after the deadline (Motion) filed by the State of Vermont, through the Vermont Department of Public Service (Vermont).[1] The Atomic Safety and Licensing Board (Board) should deny the Motion because it does not satisfy either of the applicable Commission requirements at 10 C.F.R. § 2.309(c) and 10 C.F.R. § 2.309(f)(1).

BACKGROUND

This proceeding concerns the proposed deletion of provisions of license condition 3.J. of the Vermont Yankee Nuclear Power Station (Vermont Yankee or VY) operating license held by Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (collectively,

[1] State of Vermont's Motion for Leave to File a New Contention Including the Proposed New Contention and to Add Additional Bases and Support to Existing Contentions I, III, and IV (July 6, 2015) (Agencywide Documents Access and Management System (ADAMS) Accession No. ML15187A350) (seeking the admission of a proposed Contention V, which states that "[t]he license amendment request should be denied because it is no longer accurate within the meaning of 10 C.F.R. §§ 50.9 and 50.90, does not meet the requirements of 10 C.F.R. § 50.75(h)(5), and because [the licensee] is no longer in compliance with other provisions of 10 C.F.R. §§ 50.75(h) and 50.82(a)(8)(i)(A)," and seeking the amendment of proposed Contentions I, III, and IV to add the bases for proposed Contention V as "an additional basis" for their admission) (Motion).

Entergy or the licensee).[2] These license condition provisions provide requirements for the VY decommissioning trust agreement.[3] They were originally added to the VY operating license as part of its May 2002 transfer to Entergy.[4] The purpose of their addition was to provide assurance of an adequate amount of decommissioning funding in order to ensure, in turn, the adequate protection of the public health and safety.[5]

Shortly after the addition of the decommissioning trust license condition provisions to the VY operating license, the NRC issued a final rule promulgating similar regulatory requirements at 10 C.F.R. §§ 50.75(h)(1) – (4).[6] Like the VY license condition provisions, the purpose of these new regulatory requirements was to provide "assurance that an adequate amount of decommissioning funds will be available for their intended purpose" for facilities, such as VY, that were no longer rate-regulated.[7] The NRC found that such a generic rulemaking was preferable and more efficient than "applying specific license conditions on a case-by-case basis"

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[2] *See* Letter from Christopher Wamser, Entergy, to NRC, Proposed Change No. 310 - Deletion of Renewed Facility Operating License Conditions Related to Decommissioning Trust Provisions, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28, at Attachment 2 (Sept. 4, 2014) (ADAMS Accession No. ML14254A405) (proposing to delete all of the provisions of license condition 3.J.a. and the provision of license condition 3.J. stating that "Entergy Nuclear Vermont Yankee, LLC shall take all necessary steps to ensure that the decommissioning trust is maintained in accordance with the application for approval of the transfer of this license to Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc., and the requirements of the Order approving the transfer, and consistent with the safety evaluation supporting the Order") (LAR); Biweekly Notice; Applications and Amendments to Facility Operating Licenses and Combined Licenses Involving No Significant Hazards Considerations, 80 Fed. Reg. 8,355, 8,359 (Feb. 17, 2015) (providing an opportunity for hearing on the LAR).

[3] *See* Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271, Renewed Facility Operating License, Renewed Operating License No. DPR-28, at 7-8 (Mar. 21, 2011) (ADAMS Accession No. ML052720265).

[4] *See* Order Approving Transfer of License for Vermont Yankee Nuclear Power Station from Vermont Yankee Nuclear Power Corporation to Entergy Nuclear Vermont Yankee, LLC, and Entergy Nuclear Operations, Inc., and Approving Conforming Amendment (TAC No. MB3154) at Enclosure 2, p. 8 (May 17, 2002) (ADAMS Accession No. ML020390198) (VY License Transfer Order).

[5] *Id*. at Enclosure 3, p. 7-8.

[6] *See* Decommissioning Trust Provisions, 67 Fed. Reg. 78,332 (Dec. 24, 2002) (Final rule).

[7] *Id*. at 78,332.

as had been done for VY and other facilities.[8] However, because of the existence of decommissioning trust license conditions, one commenter on the proposed rule stated that, "it is not clear whether provisions in the proposed rule will supersede license conditions previously imposed in license transfer proceedings, or whether licensees with existing license conditions governing decommissioning trusts must apply to amend their licenses and whether these amendment applications would then be subject to hearings."[9] In response, the NRC stated that, "licensees will have the option of maintaining their existing license conditions or submitting to the new requirements"[10] and it promulgated 10 C.F.R. § 50.75(h)(4), which states that any license amendment that "does no more than delete specific license conditions relating to the terms and conditions of decommissioning trust agreements involves 'no significant hazards consideration.'"

The question regarding the interaction between site-specific decommissioning trust license conditions and the generic decommissioning trust regulations persisted, though, with the Nuclear Energy Institute writing to the NRC after the promulgation of the rule, in part, that "the rule language does not reflect the intent of the Commission that individual licensees should have the option of retaining their existing license conditions."[11] The NRC agreed with this comment and addressed it through a direct final rule, less than a year after the original rulemaking, by adding to the regulations 10 C.F.R. § 50.75(h)(5), which was to become effective on December 24, 2003, the same effective date as the originally promulgated 10 C.F.R. §§ 50.75(h)(1) – (4).[12] Section 50.75(h)(5) states:

> The provisions of paragraphs (h)(1) through (h)(3) of this section do not apply to any licensee that as of December 24, 2003, has

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[8] *Id*. at 78,334.

[9] *Id*.

[10] *Id*. at 78,335.

[11] Minor Changes to Decommissioning Trust Fund Provisions, 68 Fed. Reg. 65,386, 65,387 (Nov. 20, 2003) (Final rule).

[12] *Id*.

> existing license conditions relating to decommissioning trust agreements, so long as the licensee does not elect to amend those license conditions. If a licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of paragraph (h) of this section.

Based on these regulations and their regulatory history, on September 4, 2014, Entergy submitted to the NRC its license amendment request (LAR) seeking to delete the VY decommissioning trust license condition provisions and, instead, submit to the Commission's regulations at 10 C.F.R. § 50.75(h) as, according to Entergy, "is specifically contemplated by the provisions of 10 [C.F.R. §] 50.75(h)(5), and the generic finding of no significant hazards consideration in 10 [C.F.R. §] 50.75(h)(4)."[13] Thus, Entergy characterized the LAR as "confined to administrative changes for providing consistency with existing regulations."[14] Entergy also requested that, in order for it to be consistent with the LAR, the NRC delete these same decommissioning trust provisions from the May 17, 2002 order that originally added them to the VY operating license.[15]

Separately, in anticipation of the permanent cessation of operations at VY,[16] Entergy submitted to the NRC, on December 19, 2014, an Updated Program for Management of Irradiated Fuel,[17] an updated status of the VY Decommissioning Trust Fund,[18] and a post-

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[13] LAR at 1.

[14] *Id*. at Attachment 1, p. 8.

[15] *Id*. at 2.

[16] *See* Letter from Michael Perito, Entergy, to NRC, Notification of Permanent Cessation of Power Operations, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Sept. 23, 2013) (ADAMS Accession No. ML13273A204) (informing the NRC that Entergy had decided to permanently cease operations at VY and that the plant's permanent shutdown would occur in approximately the fourth quarter of 2014).

[17] Letter from Christopher Wamser, Entergy, to NRC, Update to Irradiated Fuel Management Program Pursuant to 10 CFR 50.54(bb), Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 at Attachment 1 (Dec. 19, 2014) (ADAMS Accession No. ML14358A251).

[18] Letter from Coley C. Chappell, Entergy, to NRC, Update to Decommissioning Funding Status Report, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Dec. 19, 2014) (ADAMS Accession No. ML14358A250).

shutdown decommissioning activities report (PSDAR) including a site specific decommissioning cost estimate (DCE),[19] and, on January 6, 2015, a request for exemption from 10 C.F.R. § 50.82(a)(8)(i)(A) and 10 C.F.R. § 50.75(h)(1)(iv) to allow Entergy to make disbursements from the VY decommissioning trust fund (DTF) to pay for certain irradiated fuel management expenses, consistent with the Updated Program for Management of Irradiated Fuel, and without providing to the NRC 30-days prior written notification.[20] The Exemption Request essentially sought to allow Entergy to be able to use the VY DTF for certain irradiated fuel management expenses in the same manner that the Commission's regulations permit a licensee to use a DTF for decommissioning expenses after decommissioning has begun.

On January 12, 2015, pursuant to 10 C.F.R. § 50.82(a)(1)(i) and (ii), Entergy certified to the NRC that VY had permanently ceased operations and that fuel had been permanently removed from the VY reactor vessel and placed in the VY spent fuel pool (SFP).[21] Consequently, pursuant to 10 C.F.R. § 50.82(a)(2), the VY operating license no longer authorizes operation of the reactor or emplacement or retention of fuel into the reactor vessel.

On February 17, 2015, the NRC published in the *Federal Register* a notice of opportunity to request a hearing and petition for leave to intervene on the LAR.[22] On the deadline for filing

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[19] Letter from Christopher Wamser, Entergy, to NRC, Post Shutdown Decommissioning Activities Report, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 at Enclosure (Dec. 19, 2014) (ADAMS Accession No. ML14357A110) (PSDAR).

[20] Letter from Christopher Wamser, Entergy, to NRC, Request for Exemptions from 10 CFR 50.82(a)(8)(i)(A) and 10 CFR 50.75(h)(1)(iv), Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Jan 6. 2015) (ADAMS Accession No. ML15013A171) (Exemption Request).

[21] Letter from Christopher Wamser, Entergy, to NRC, Certifications of Permanent Cessation of Power Operations and Permanent Removal of Fuel from the Reactor Vessel, Vermont Yankee Nuclear Power Station, Docket No. 50-271, License No. DPR-28 (Jan. 12, 2015) (ADAMS Accession No. ML15013A426).

[22] 80 Fed. Reg. at 8,356.

such requests and petitions, April 20, 2015, Vermont filed a Hearing Request.[23] Vermont's Hearing Request proffered four contentions, all of which the Staff and Entergy opposed.

In its proposed Contention I, Vermont argued that the LAR should be denied because it would allow Entergy to make disbursements from the DTF after decommissioning had begun without providing 30-days prior written notice to the NRC and that this change threatened the sufficiency of the DTF.[24] The Staff responded that this was an impermissible challenge to the Commission's regulations at 10 C.F.R. § 50.75(h)(1)(iv), which explicitly state that prior notification is not required for decommissioning disbursements after decommissioning has begun.[25] Proposed Contention I also challenged the LAR as contrary to the VY master trust agreement (MTA) and Vermont Public Service Board Orders, challenged Entergy's estimates of irradiated fuel management and decommissioning costs, challenged Entergy's PSDAR and Exemption Request, and challenged Entergy's alleged use of the DTF for expenses that are not

[23] *See* State of Vermont's Petition for Leave to Intervene and Hearing Request (Apr. 20, 2015) (Hearing Request) (available as a package at ADAMS Accession No. ML15110A484 along with: Declaration of Anthony R. Leshinskie (Apr. 20, 2015) (Leshinskie Declaration); Anthony R. Leshinskie *curriculum vitae* (Leshinskie CV); Declaration of William Irwin, Sc.D, CHP (Apr. 20, 2015) (Irwin Declaration); William E. Irwin, Sc.D., CHP *curriculum vitae* (Irwin CV); Exhibit 1, Comments of the State of Vermont [on the Vermont Yankee Post-Shutdown Decommissioning Activities Report (PSDAR)] (Mar. 6, 2015) (Vermont's PSDAR Comments); Exhibit 2, Entergy Nuclear Vermont Yankee, LLC Master Decommissioning Trust Agreement for Vermont Yankee Nuclear Power Station (July 31, 2002) (MTA)).

[24] Hearing Request at 3-4.

[25] NRC Staff Answer to State of Vermont Petition for Leave to Intervene and Hearing Request, 27-29 (May 15, 2015) (ADAMS Accession No. ML15135A523) (Staff Answer). The Staff Answer also explained that the 2002 decommissioning fund rulemaking specifically recognized that a more restrictive 30-day notification provision for decommissioning disbursements after decommissioning has begun, like what Vermont is advocating, would not add any assurances that funding will be available and would duplicate the annual notification requirements of 10 C.F.R. § 50.82(a)(8)(v). *Id*. *See also* Entergy's Answer Opposing State of Vermont's Petition for Leave to Intervene and Hearing Request, 14-16 (May 15, 2015) (ADAMS Accession No. ML15135A498) (Entergy Answer).

permitted.[26] The Staff responded that none of these arguments are within the scope of this proceeding, which is limited to the LAR.[27]

In its proposed Contention II, Vermont argued that the LAR should be denied as untimely because it was submitted years after the December 24, 2003 effective date of the regulations on which it relies and does not justify this alleged untimeliness through a petition for reconsideration or through satisfying the criteria for late-filed contentions.[28] The Staff responded that this proposed contention was not material to the findings that the NRC must make on the LAR because neither the general requirements for license amendment requests at 10 C.F.R. §§ 50.90 – 50.92 nor the specific requirement governing the LAR at 10 C.F.R. § 50.75(h)(5) limit the LAR with respect to time and because the timeliness requirements referenced by Vermont are only relevant to adjudicatory hearings and not to licensing actions.[29]

In its proposed Contention III, Vermont argued that, consistent with the Commission rulings in *Private Fuel Storage*[30] and *Honeywell*,[31] it has a right to a hearing opportunity on the Exemption Request because of its assertion that the Exemption Request is "directly related" to the LAR.[32] The Staff responded that this precedent was inapposite to the situation at hand

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[26] Hearing Request at 4-6.

[27] Staff Answer at 30-36. *See also* Entergy Answer at 14-26 (arguing that Contention I constituted an impermissible challenge to NRC regulations, raised issues beyond the scope of the proceeding, and was unsupported and immaterial).

[28] Hearing Request at 17-18.

[29] Staff Answer at 36-39. *See also* Entergy Answer at 26-29 (arguing that Contention II constituted an impermissible challenge to NRC regulations and thus raised an issue beyond the scope of the proceeding and was unsupported and immaterial).

[30] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-01-12, 53 NRC 459 (2001) (*PFS*).

[31] *Honeywell Int'l, Inc.* (Metropolis Works Uranium Conversion Facility), CLI-13-1, 77 NRC 1 (2013).

[32] Hearing Request at 20, 26.

because, in this instance, the granting of Entergy's Exemption Request is not required for the granting of its LAR.[33]

In its proposed Contention IV, Vermont argued that the LAR does not satisfy the National Environmental Policy Act of 1969, as amended (NEPA), because Entergy did not submit an environmental report, because the use of the categorical exclusion at 10 C.F.R. § 51.22(c)(10), as suggested by Entergy in the LAR,[34] is not appropriate, and because the environmental impacts of the LAR should be evaluated in a single environmental review along with the environmental impacts of the Exemption Request and the PSDAR.[35] The Staff responded: that the Commission's regulations do not require that Entergy submit an environmental report with its LAR; that a categorical exclusion is a form of environmental review under NEPA and that Vermont had not demonstrated that it would be unreasonable to apply 10 C.F.R. § 51.22(c)(10) to the LAR since the LAR is a change to recordkeeping, reporting, or administrative procedures or requirements; and that the Commission's regulations explicitly provide for the environmental review of decommissioning only upon the submission of a license termination plan,[36] which is required at least two years before the date of license termination.[37]

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[33] Staff Answer at 31-32 (citing *PFS*, CLI-01-12, 53 NRC at 467 ("In contrast to *Zion* [*Commonwealth Edison Co*. (Zion Nuclear Power Station), CLI-00-5, 51 NRC 90 (2000)] and *Massachusetts* [*Commonwealth of Massachusetts v. NRC*, 878 F.2d 1516 (1st Cir. 1989)], here we face a case where seismic analysis of the site for the proposed facility and establishing the facility's design earthquake are required elements of the *license application* process. Pursuant to 10 C.F.R. § 72.40, [the applicant] must show that it meets our regulatory requirements, or that an exemption from a particular requirement is in order, before the NRC can find the facility safe and license it. Because resolution of the exemption request directly affects the licensability of the proposed [facility], the exemption raises material questions directly connected to an agency licensing action, and thus comes within the hearing rights of interested parties." (emphasis in original)). *See also* Entergy Answer at 29-36 (arguing that Contention III constituted an impermissible challenge to NRC regulations and was unsupported and immaterial).

[34] LAR at Attachment 1, p. 8.

[35] Hearing Request at 26-31.

[36] Staff Answer at 48-56. *See also* Entergy Answer at 36-43 (arguing that Contention IV raises issues beyond the scope of the proceeding, fails to raise a genuine dispute with the LAR, and is unsupported and immaterial).

[37] 10 C.F.R. § 50.82(a)(9)(i). The scheduled date for license termination at VY is 2073. PSDAR at 8.

On June 17, 2015, the NRC granted the Exemption Request.[38] The NRC determined that, consistent with 10 C.F.R. § 50.12: the requested exemptions were authorized by law, did not present an undue risk to the public health and safety, and were consistent with the common defense and security; the application of the regulations in the particular circumstances would not serve the underlying purpose of the regulations; and compliance with the regulations would result in undue hardship or other costs that are significantly in excess of those contemplated when the regulations were adopted.[39] The NRC supported this determination by finding (1) that the exemption allowing the use of the VY DTF for certain irradiated fuel management costs will not adversely impact Entergy's ability to complete radiological decommissioning within 60 years and terminate the VY operating license and (2) that the exemption eliminating the 30-day prior notification requirement for these irradiated fuel management withdrawals will not affect the sufficiency of the DTF because the withdrawals are still constrained by 10 C.F.R. § 50.82(a)(8)(i)(B) – (C) and are reviewable under the annual reporting requirements of 10 C.F.R. § 50.82(a)(8)(v) – (vii).[40] Substantively identical exemption requests have previously

[38] *See* Letter from NRC to Entergy, Vermont Yankee Nuclear Power Station - Exemptions from the Requirements of 10 CFR Part 50, Sections 50.82(a)(8)(i)(A) and 50.75(h)(1)(iv) (June 17, 2015) (ADAMS Accession No. ML15128A219). The Staff informed the Board and the parties to this proceeding of the granting of the Exemption Request on June 18, 2015. *See* Letter from Beth Mizuno, NRC, to Administrative Judges Froehlich, Kennedy, and Wardwell, In the Matter of Entergy Nuclear Vermont Yankee, LLC and Entergy Nuclear Operations, Inc. (Vermont Yankee Nuclear Power Station), Docket No. 50-271-LA-3, Board Notification of Issuance of Exemptions (June 18, 2015) (ADAMS Accession No. ML15169A248). Notification of the granting of the Exemption Request was then published in the *Federal Register* on June 23, 2015. *See* Entergy Nuclear Operations, Inc.; Vermont Yankee Nuclear Power Station, 80 Fed. Reg. 35,992 (June 23, 2015). Subsequently, on July 2, 2015, Vermont notified the Board and the parties of this publication. *See* State of Vermont's Notice of Supplemental Authority (July 2, 2015) (ADAMS Accession No. ML15183A374).

[39] Letter from NRC to Entergy, Vermont Yankee Nuclear Power Station - Exemptions from the Requirements of 10 CFR Part 50, Sections 50.82(a)(8)(i)(A) and 50.75(h)(1)(iv), at Enclosure, p. 4-9.

[40] *Id*. at Enclosure, p. 5.

been granted for Kewaunee Power Station,[41] San Onofre Nuclear Generating Station, Units 2 and 3,[42] and Crystal River Unit 3 Nuclear Generating Plant.[43]

On July 6, 2015, after the April 20, 2015 deadline for filings in this proceeding, Vermont filed the instant Motion. The Motion seeks the admission of a new proposed Contention V. In this proposed Contention V, Vermont argues that the LAR should be denied because, according to Vermont, (1) with the granting of the Exemption Request, the LAR is "no longer accurate within the meaning of 10 C.F.R. §§ 50.9 and 50.90" and (2) its approval would "violate the requirement of 10 C.F.R. [§] 50.75(h)(5)" since VY has now been exempted from provisions of 10 C.F.R. §§ 50.75(h) and 50.82(a)(8)(i)(A).[44] Vermont's Motion also seeks to add the fact of the NRC's granting of the Exemption Request as "an additional basis for admission of [Vermont's] previous Contentions I, III and IV."[45]

DISCUSSION

I. Legal Standards

A. 10 C.F.R. § 2.309(c) and Motions for Leave to File New or Amended Contentions Filed After the Deadline

Motions for leave to file new or amended contentions filed after the filing deadline in 10 C.F.R. § 2.309(b) will not be entertained absent a determination by the presiding officer that the petitioner has demonstrated "good cause" by showing that:

> (i) The information upon which the filing is based was not previously available;

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[41] *See* License Exemption Request for Dominion Energy Kewaunee, Inc., 79 Fed. Reg. 30,900 (May 29, 2014).

[42] *See* Southern California Edison Company; San Onofre Nuclear Generating Station, Units, 2 and 3, 79 Fed. Reg. 55,019 (Sept. 15, 2014).

[43] *See* Duke Energy Florida, Inc.; Crystal River Unit 3 Nuclear Generating Plant, 80 Fed. Reg. 5,795 (Feb. 3, 2015).

[44] Motion at 4-5.

[45] *Id*. at 7.

> (ii) The information upon which the filing is based is materially different from information previously available; and
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> (iii) The filing has been submitted in a timely fashion based on the availability of the subsequent information.[46]

The dispositive question with respect to "good cause" is essentially "whether the contention could have been raised earlier."[47] The burden of showing good cause is on the petitioner.[48] Furthermore, the petitioner has an "iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."[49] Thus, the petitioner may not delay filing a contention until a document becomes available that collects, summarizes, and places into context the facts supporting the contention, because doing so "would turn on its head the regulatory requirement that new contentions be based on information . . . not previously available."[50]

B. 10 C.F.R. § 2.309(f)(1) and Contention Admissibility

New or amended contentions filed after the filing deadline in 10 C.F.R. § 2.309(b) must also meet the applicable contention admissibility requirements of 10 C.F.R. § 2.309(f).[51] A proposed contention is admissible under 10 C.F.R. § 2.309(f) only if it:

> (i) Provide[s] a specific statement of the issue of law or fact to be raised or controverted . . .;

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[46] 10 C.F.R. § 2.309(c)(1).

[47] *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-21, 76 NRC 491, 498 (2012) (citing *Entergy Nuclear Generation Co. and Entergy Nuclear Operations, Inc.* (Pilgrim Nuclear Power Station), CLI-12-10, 75 NRC 479, 492-93 (2012) (faulting a petition for review for not explaining how its late-filed contention "could not have been raised at the outset of this proceeding.")).

[48] *See, e.g., Detroit Edison Co.* (Enrico Fermi Atomic Power Plant, Unit 2), LBP-82-96, 16 NRC 1408, 1432 (1982).

[49] *Northern States Power Co*. (Prairie Island Nuclear Generating Plant, Units 1 and 2), CLI-10-27, 72 NRC 481, 496 (2010) (quoting *Sacramento Mun. Util. Dist.* (Rancho Seco Nuclear Generating Station), CLI-93-3, 37 NRC 135, 147 (1993) (internal quotation marks and footnote omitted)).

[50] *Id*. (internal quotation marks and emphasis omitted).

[51] 10 C.F.R. § 2.309(c)(4).

> (ii) Provide[s] a brief explanation of the basis for the contention;
>
> (iii) Demonstrate[s] that the issue raised in the contention is within the scope of the proceeding;
>
> (iv) Demonstrate[s] that the issue raised in the contention is material to the findings the NRC must make to support the action that is involved in the proceeding;
>
> (v) Provide[s] a concise statement of the alleged facts or expert opinions which support the requestor's/petitioner's position on the issue and on which the petitioner intends to rely at hearing, together with references to the specific sources and documents on which the requestor/petitioner intends to rely to support its position on the issue; [and]
>
> (vi) . . . provide[s] sufficient information to show that a genuine dispute exists with the applicant/licensee on a material issue of law or fact. This information must include references to specific portions of the application . . . .[52]

The contention admissibility requirements of 10 C.F.R. § 2.309(f)(1) are intended to "focus litigation on concrete issues and result in a clearer and more focused record for decision."[53] The Commission has stated that it "should not have to expend resources to support the hearing process unless there is an issue that is appropriate for, and susceptible to, resolution in an NRC hearing" as indicated by a proffered contention that satisfies all of the 10 C.F.R. § 2.309(f)(1) requirements.[54] Thus, the Commission has emphasized that the 10 C.F.R. § 2.309(f)(1) requirements are "strict by design."[55] The failure to comply with any one of the

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[52] 10 C.F.R. § 2.309(f)(1).

[53] Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,202 (Jan. 14, 2004) (Final rule).

[54] *Id*.

[55] *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Units 2 & 3), CLI-01-24, 54 NRC 349, 358 (2001), *petition for recons. denied*, CLI-02-01, 55 NRC 1 (2002).

10 C.F.R. § 2.309(f)(1) requirements is grounds for the dismissal of a contention[56] and attempting to satisfy these requirements by "[m]ere 'notice pleading' does not suffice."[57]

Pursuant to 10 C.F.R. § 2.309(f)(1)(iii), a proposed contention must be rejected if it raises issues outside of the scope of the proceeding, which is dictated by the Commission's hearing notice.[58] Thus, a proposed contention that challenges a license amendment must confine itself to "health, safety or environmental issues fairly raised by [the license amendment]."[59] The adequacy of the Staff's review, as opposed to the adequacy of the application, cannot be challenged.[60] Moreover, an atomic safety and licensing board lacks the authority to supervise the Staff's review.[61] Finally, a proposed contention must be rejected if it challenges the Commission's regulations without a waiver of those regulations, as is provided for by 10 C.F.R. § 2.335(b), because such a challenge is necessarily beyond the scope of the

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[56] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-99-10, 49 NRC 318, 325 (1999) (citing *Arizona Pub. Serv. Co.* (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991)).

[57] *Amergen Energy Co., L.L.C.* (Oyster Creek Nuclear Generating Station), CLI-06-24, 64 NRC 111, 119 (2006) (quoting *Exelon Generation Co., LLC* (Early Site Permit for Clinton ESP Site), CLI-05-29, 62 NRC 801, 808 (2005)).

[58] *See Public Serv. Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976).

[59] *Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 624 (1981).

[60] *See Prairie Island*, CLI-10-27, 72 NRC at 493 n.56 ("The contention . . . inappropriately focused on the Staffs [sic] review of the application rather than upon the errors and omissions of the application itself. Such challenges are not permitted in our adjudications. *See, e.g.*, *Dominion Nuclear Connecticut, Inc.* (Millstone Nuclear Power Station, Unit 3), CLI-09-5, 69 NRC 115, 123 n.39 (2009); Final Rule: 'Changes to Adjudicatory Process,' 69 Fed. Reg. 2182, 2202 (Jan. 14, 2004).").

[61] *See Crow Butte Resources, Inc.* (In Situ Leach Facility, Crawford, Nebraska), CLI-12-4, 75 NRC 154, 156 (2012).

proceeding.[62] Instead, changes to the Commission's regulations may be addressed through 10 C.F.R. § 2.802 petitions for rulemaking.[63]

Pursuant to 10 C.F.R. § 2.309(f)(1)(iv), a proposed contention must be rejected if it raises an issue that is not material to the findings that the NRC must make to support the action that is involved in the proceeding. The proponent of a proposed contention in a licensing proceeding "must demonstrate that the subject matter of the contention would impact the grant or denial of [the] pending license application."[64] In other words, the issue raised in the proposed contention "must make a difference in the outcome of the licensing proceeding so as to entitle the petitioner to cognizable relief."[65]

II. Vermont's Motion is Inadmissible Because it Does Not Satisfy 10 C.F.R. § 2.309(c) or 10 C.F.R. § 2.309(f)(1)

The Board should deny Vermont's Motion both (1) because, in contravention of 10 C.F.R. § 2.309(c), its arguments could have been and, in fact, were, raised earlier and (2) because, in contravention of 10 C.F.R. § 2.309(f)(1)(iii) – (iv), its proposed Contention V is outside the scope of this proceeding regarding Entergy's LAR and raises issues that are not material to the findings that the NRC must make on the LAR.

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[62] 10 C.F.R. § 2.335(a). *See also Philadelphia Elec. Co*. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 20 (1974) ("[A] licensing proceeding before this agency is plainly not the proper forum for an attack on applicable statutory requirements or for challenges to the basic structure of the Commission's regulatory process.").

[63] 10 C.F.R. § 2.335(e).

[64] *Entergy Nuclear Operations, Inc.* (Indian Point, Units 2 and 3), LBP-08-13, 68 NRC 43, 62 (2008).

[65] *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-7, 47 NRC 142, 179 (1998), *reconsid. granted in part on other grounds,* LBP-98-10, 47 NRC 288 (1998). *See also* Rules of Practice for Domestic Licensing Proceedings – Procedural Changes in the Hearing Process, 54 Fed. Reg. 33,168, 33,168 (Aug. 11, 1989) (Final rule) ("[A]dmission of a contention may also be refused . . . if it is determined that the contention, even if proven, would be of no consequence in the proceeding because it would not entitle the petitioner to relief.").

A. Vermont's Motion Does Not Satisfy 10 C.F.R. § 2.309(c)

The Board should deny Vermont's Motion because Vermont has not demonstrated good cause for filing it after the April 20, 2015 deadline in this proceeding. Vermont argues that its Motion satisfies 10 C.F.R. § 2.309(c) because it is based on the June 23, 2015 *Federal Register* notice of the NRC's granting of the Exemption Request, which Vermont asserts is new and materially different information.[66] However, this *Federal Register* notice is not information that is materially different from information previously available; instead, it is more accurately viewed as a document collecting, summarizing, and placing into context facts previously available in the VY Exemption Request, the VY PSDAR, and the VY Updated Program for Management of Irradiated Fuel. Additionally, all of the arguments in Vermont's Motion have already been raised in its previous, timely filings. Therefore, Vermont's Motion does not satisfy 10 C.F.R. § 2.309(c) and, thus, should be denied.

In its June 23, 2015 *Federal Register* notice, the NRC stated that it had granted the Exemption Request after using Entergy's specific financial situation as described in the VY PSDAR and Updated Program for Management of Irradiated Fuel to perform an "independent cash flow analysis," which "*confirmed* that the current funds, planned future contributions, and projected earnings of the [DTF] provide reasonable assurance of adequate funding to complete all NRC required decommissioning activities and to conduct irradiated fuel management in accordance with the [U]pdated Irradiated Fuel Management Plan and PSDAR."[67] Since this amounts to a confirmation of previously-available information, the *Federal Register* notice is not, in and of itself, new and materially different information on which a late-filed contention can be based. As stated by the Commission, permitting a participant to wait to file contentions until the Staff has compiled the relevant information would be inconsistent with the Commission's

[66] Motion at 2 (citing 80 Fed. Reg. at 35,992-95).

[67] 80 Fed. Reg. at 35,993-94 (emphasis added).

longstanding policy that a petitioner has an "iron-clad obligation to examine the publicly available documentary material . . . with sufficient care to enable it to uncover any information that could serve as the foundation for a specific contention."[68] To find otherwise in response to Vermont's Motion would be akin to permitting the filing of contentions on a Staff environmental impact statement that presents the same facts as the applicant's environmental report on which it is based.[69] However, the adequacy of a Staff review, as opposed to the adequacy of the application, cannot be challenged.[70] In short, since the June 23, 2015 *Federal Register* notice provides a Staff review confirming information previously available in the VY Exemption Request, the VY PSDAR, and the VY Updated Program for Management of Irradiated Fuel, it is not new and materially different information and, therefore, Vermont's late-filed Motion based on the *Federal Register* notice, instead of on the underlying Entergy documents, cannot satisfy 10 C.F.R. § 2.309(c).

Vermont's assertion that the June 23, 2015 *Federal Register* notice of the NRC's granting of the Exemption Request constitutes new and materially different information is further belied by the fact that Vermont's Motion effectively repeats arguments that Vermont has already made in this proceeding and, thus, there is no good cause for admitting those arguments now. For example, Vermont's argument that the LAR is not accurate for not referencing the Exemption Request goes to the core of all of its previous arguments, which, as Vermont itself concedes,[71] is that the LAR and Exemption Request are somehow dependent on one another.

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[68] *Prairie Island*, CLI-10-27, 72 NRC at 496 (quoting *Rancho Seco*, CLI-93-3, 37 NRC at 147 (internal quotation marks and footnote omitted)).

[69] *See, e.g., Powertech USA, Inc.* (Dewey-Burdock in Situ Uranium Recovery Facility), LBP-13-9, 78 NRC 37, 111-12 (2013) (rejecting a contention as impermissibly late for its failure to explain how the information in a draft supplemental environmental impact statement is materially different from the information contained in the applicant's previously-available environmental report).

[70] *See Prairie Island*, CLI-10-27, 72 NRC at 493 n.56.

[71] *See* Motion at 2-3 (stating that the Exemption Request "formed the basis for the [Vermont] Petition to Intervene"; that "the [Exemption Request] and its implications were a focus of the [Vermont]

Vermont's concern has been, and seemingly continues to be, that if the LAR, *in conjunction with the Exemption Request*, were granted, then there would no longer be adequate assurance that the VY DTF would be sufficient for decommissioning.[72] This argument is necessarily based on Vermont's assumption that the Exemption Request would be granted. Given that Vermont had already made this assumption, Vermont could have raised its argument that the LAR is insufficient for not referencing the Exemption Request at the outset of this proceeding. And, in fact, Vermont did previously raise this argument.[73]

Vermont's Motion also argues that the LAR would delete the VY decommissioning trust license condition provisions and replace them with the requirements of 10 C.F.R. § 50.75(h), *as exempted by the Exemption Request*. This argument effectively combines the LAR, which would delete the VY decommissioning trust license condition provisions and replace them with 10 C.F.R. § 50.75(h), *in its entirety*, with the Exemption Request, which, in part, exempted VY, in certain circumstances, from certain of the 10 C.F.R. § 50.75(h) requirements. Vermont then concludes that, since the LAR combined with the Exemption Request would apply requirements to VY that differ from 10 C.F.R. § 50.75(h), the granting of the LAR would be contrary to 10

Petition to Intervene"; and that "[Vermont] has maintained that the [E]xemption [R]equest is inextricably connected to the LAR throughout this proceeding.").

[72] *See* The State of Vermont's Reply to NRC Staff and Entergy Answers to Petition for Leave to Intervene and Hearing Request at 5-7 (May 22, 2015) (ADAMS Accession No. ML15142A902) (stating that the LAR, combined with the Exemption Request, "allows Entergy to . . . eliminate the 30-day notice requirement for withdrawals for spent fuel management expenses" which "places the public and the environment at risk that Entergy will not have the funds to fully decommission and decontaminate Vermont Yankee.") (Reply). *See also id.* at 9 ("[T]he actual regulatory regime Entergy seeks—through the LAR combined with the exemption request—is the elimination of the 30-day notice requirement for all withdrawals for purported decommissioning *and spent fuel management* expenses." (emphasis in original)).

[73] *Id*. at 9 ("According to Entergy, [Vermont's argument that the Exemption Request depends upon the LAR] is irrelevant because the LAR does not mention the exemption request. But that is precisely the problem. The LAR purports to be substituting *all* of 50.75(h) for the current provisions in the Vermont Yankee license. In truth, the LAR is directly connected to an effort by Entergy to substitute only *part* of 50.75(h) for the current license provisions. . . . [T]o evaluate the merits of Entergy's proposed trade (substituting 50.75(h) for its current licensing provisions), the Board must consider the fact that Entergy is simultaneously seeking to be exempted from portions of 50.75(h)." (emphasis in original)).

C.F.R. § 50.75(h)(5), which states that, "[i]f a licensee with existing license conditions relating to decommissioning trust agreements elects to amend those conditions, the license amendment shall be in accordance with the provisions of [10 C.F.R. § 50.75(h)]."[74] However, Vermont previously made a substantively identical argument in its Reply brief.[75] Additionally, Vermont's Motion asserts that the MTA restricts Entergy's ability to make disbursements from the VY DTF for non-decommissioning expenses;[76] however, Vermont previously made this argument in its Hearing Request.[77] Finally, Vermont's Motion asserts that the "elimination of the 30-day notice requirement results in the removal of a crucial opportunity for [the] NRC and the public to prevent diversion of decommissioning funds" and which opportunity Vermont has relied upon.[78] These too are arguments that Vermont made previously.[79] Ultimately, all of the arguments in Vermont's Motion were raised earlier and, therefore, not only is their repetition now inexcusably late, but their repetition also amounts to the impermissible filing of a second reply brief.[80]

In conclusion, the June 23, 2015 *Federal Register* notice of the NRC's granting of the Exemption Request is not new and materially different information but is, instead, a Staff confirmation of previously-available information. Therefore, Vermont could have, and actually

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[74] Motion at 4-6.

[75] Reply at 9-10 ("It is undisputed that under 10 C.F.R. § 50.75(h)(5), any LAR such as the one at issue here 'shall be in accordance with the provisions of paragraph (h) of this section.' It is further undisputed that Entergy's LAR, when combined with its pending exemption request, seeks to eliminate the 30-day notice requirement for spent fuel management expenses. That is *inconsistent* with 50.75(h). Because the LAR is not 'in accordance with the provisions of paragraph (h) of this section,' it must be denied." (citations omitted; emphasis in original)).

[76] Motion at 5 n.10.

[77] *See, e.g.*, Hearing Request at 11, 13.

[78] Motion at 6.

[79] *See, e.g.*, Hearing Request at 5 ("The 30 day notice provision provides an essential, as well as legally required, opportunity for NRC, the State, and the public to prevent depletion of the [DTF] to the point where it is no longer able to meet the needs of a legally required decommissioning."); *id*. at 18 ("[The LAR] is late and prejudicial to Vermont, which has relied on the license condition, including the requirement for 30 days notice before any withdrawal from the [DTF], to protect its interests and to assure that it would have an opportunity to step in and protest improper withdrawals from the [DTF] *before* they occur." (emphasis in original)).

[80] *See* 10 C.F.R. § 2.309(i)(3) ("No other written answers or replies will be entertained.").

did, earlier raise the arguments that it now belatedly makes on the basis of this *Federal Register* notice. As a result, Vermont's Motion does not satisfy 10 C.F.R. § 2.309(c) and should be denied.

B. Vermont's Motion Does Not Satisfy 10 C.F.R. § 2.309(f)(1)(iii) – (iv)

The Board should also deny Vermont's Motion because its proposed Contention V is based on the Exemption Request; however, the Exemption Request is (1) outside the scope of this proceeding on the LAR, in contravention of 10 C.F.R. § 2.309(f)(1)(iii), and (2) not material to the findings that the NRC must make on the LAR, in contravention of 10 C.F.R. § 2.309(f)(1)(iv). Vermont's Motion is attempting to integrate the separate Exemption Request into the LAR as a means to gain an adjudicatory hearing on the Exemption Request, despite the fact that no such hearing is provided for by law.

Vermont's proposed Contention V consists of two arguments. First, Vermont argues that, now that the NRC has granted the Exemption Request, the LAR is in violation of 10 C.F.R. §§ 50.9(a) and 50.90 for not referencing the Exemption Request.[81] Thus, whereas 10 C.F.R. § 50.9(a) states that information provided to the NRC by a licensee "shall be complete and accurate in all material respects," and 10 C.F.R. § 50.90 states that "[w]henever a holder of a license . . . desires to amend the license . . . application for an amendment must be filed with the Commission . . . fully describing the changes desired," Vermont argues that the LAR is not "accurate in all material respects" and "does not fully describe the changes desired in all material respects."[82] One example that Vermont provides of this alleged inaccuracy and incompleteness of the LAR now that the Exemption Request has been granted is that "the comparison chart provided with the LAR, which purports to show the similarity between the proposed license amendment and the provisions of 10 C.F.R. § 50.75(h), is objectively incorrect

[81] Motion at 4-6.

[82] *Id*. at 4.

since Entergy is now exempted from some of the . . . requirements of [10 C.F.R.] § 50.75(h)."[83] Second, Vermont argues that approving the LAR would "violate the requirement of 10 C.F.R. [§] 50.75(h)(5)."[84] This regulation states, in part, that a licensee may elect to amend its decommissioning trust license conditions as long as the amendment is "in accordance with [10 C.F.R. § 50.75(h)]." Vermont interprets this as allowing "substitution of the regulatory requirement for the license provisions only when they are substantially identical" and argues that this is not the case for VY because the license condition provisions would be substituted for the regulatory provisions *as exempted by the now-granted Exemption Request*.[85]

In essence, both of Vermont's proposed Contention V arguments are based on Vermont's assumption that the LAR effectively accomplishes an exchange of the VY decommissioning trust license condition provisions for the decommissioning trust regulations, *as exempted by the Exemption Request*. However, a close reading of the LAR, the Exemption Request, and the relevant regulations and case law demonstrates that this is not the case and that, instead, the LAR and the Exemption Request are two separate and independent requests that should not be conflated.[86] Their separateness is illustrated, as discussed in more detail below, by the fact that the LAR: (1) seeks to exchange the VY decommissioning trust license condition provisions for the decommissioning trust regulations at 10 C.F.R. § 50.75(h), in their entirety; (2) is evaluated by the NRC under the standard of 10 C.F.R. § 50.92; and (3) gives rise to a hearing opportunity under the Atomic Energy Act of 1954, as amended (AEA), § 189a., while the Exemption Request: (1) seeks, in part, to exempt VY from certain portions of 10 C.F.R. § 50.75(h) in certain circumstances (*i.e.*, to allow disbursements for certain irradiated fuel

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[83] *Id*. at 3.

[84] *Id*. at 5.

[85] *Id*. at 6.

[86] *See, e.g., Zion*, CLI-00-5, 51 NRC at 96-97 (explaining that granting an exemption is distinct from amending a license).

management expenses before final decommissioning has been completed and to not require 30-days prior written notification for these disbursements); (2) is evaluated by the NRC under the standard of 10 C.F.R. § 50.12; and (3) does not give rise to a hearing opportunity.

Because the LAR and the Exemption Request are separate and independent, Vermont's arguments in its proposed Contention V necessarily fail. Vermont's first argument fails because the LAR is not inaccurate or incomplete for not referencing the Exemption Request since the Exemption Request is not actually material to the LAR. Vermont's second argument fails because the NRC's safety evaluation of the LAR will indeed determine whether Entergy's requested amendment is "in accordance with the provisions of [10 C.F.R. § 50.75(h)]" as is required by 10 C.F.R. § 50.75(h)(5). Although this safety evaluation will only evaluate the exchange of the VY decommissioning trust license condition provisions for the decommissioning trust regulations, *in their entirety*, this is sufficient because the safety issue raised by Vermont regarding the exemption of portions of the decommissioning trust regulations is fully addressed in the Staff's separate and independent safety evaluation of the Exemption Request. In short, Vermont only has an adjudicatory hearing opportunity with respect to the LAR,[87] which is the basis for this proceeding,[88] but its proposed Contention V challenges the LAR based on the Exemption Request, which is outside the scope of this LAR proceeding and not material to the findings that the NRC must make on the LAR. Therefore, pursuant to 10 C.F.R. § 2.309(f)(1)(iii) – (iv), the Board should deny Vermont's Motion.

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[87] AEA § 189a.(1)(A) ("In any proceeding under this Act, for the . . . amending of any license . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding."); *Zion*, CLI-00-5, 51 NRC at 96 (holding that, with the AEA, "Congress intentionally limited the opportunity for a hearing to certain designated agency actions – agency actions that do *not* include exemptions." (emphasis in original)).

[88] *Marble Hill*, ALAB-316, 3 NRC at 170-71 (the scope of a proceeding is dictated by the Commission's hearing notice); 80 Fed. Reg. at 8,359 (providing notice of an opportunity for hearing on the LAR).

1. The LAR and the Exemption Request are Separate and Independent of Each Other

The LAR and the Exemption Request are two separate and independent actions such that the granting of the Exemption Request is not determinative of the granting of the LAR and vice-versa. Their separateness is understood through understanding the differences in (1) what each is requesting, (2) the regulatory requirements that are applicable to each, and (3) the practical effects of the granting of each.

The LAR seeks the deletion of the VY decommissioning trust license condition provisions, that, as part of its 2002 order imposing them, the NRC had found to be sufficiently protective of the public health and safety, and their replacement with decommissioning trust regulations, that, upon their promulgation, the NRC had also found to be sufficiently protective of the public health and safety. Thus, the LAR would simply exchange a set of sufficiently protective license condition provisions with a set of sufficiently protective regulatory requirements. Neither the existence nor the granting of the Exemption Request changes the question material to the finding that the NRC must make on the LAR under 10 C.F.R. § 50.92; that is, is there reasonable assurance that the activities authorized by the LAR (*i.e.*, the exchange of license condition provisions for regulations) can be conducted without endangering the health and safety of the public?[89] Because the safety of both options has already been determined by the NRC, all that remains for the NRC to evaluate in this instance is whether the correct license condition provisions are proposed to be deleted and the correct regulatory provisions are proposed to replace them. Moreover, because this proposed exchange involves making a change to an operating license (*i.e.*, the deletion of the VY decommissioning trust license condition provisions), Entergy acted appropriately under the Commission's regulations in

[89] *See* 10 C.F.R. § 50.57(a)(3); 10 C.F.R. § 50.92(a) ("In determining whether an amendment to a license . . . will be issued to the applicant, the Commission will be guided by the considerations which govern the issuance of initial licenses . . . to the extent applicable and appropriate.").

requesting it via a license amendment request,[90] which, in turn, gave rise to a hearing opportunity on the LAR,[91] which, ultimately, is the sole basis for this instant proceeding.[92]

On the other hand, whether the Exemption Request should be granted is a separate and independent question determined by a separate and independent regulatory process; that is, by 10 C.F.R. § 50.12 instead of 10 C.F.R. § 50.92. The 10 C.F.R. § 50.12 standard is different than that of 10 C.F.R. § 50.92; it states that the Commission may grant exemptions from the requirements of its regulations which are: (1) authorized by law, will not present an undue risk to the public health and safety, and are consistent with the common defense and security; and (2) present special circumstances such as that the application of the regulation in the particular circumstances would not serve the underlying purpose of the rule or that compliance would result in undue hardship. Neither the existence nor the granting of the LAR is material to the findings that the NRC must make under this standard. Moreover, as opposed to license amendment requests, exemption requests do not give rise to hearing opportunities.[93]

The separateness of the LAR and the Exemption Request is further demonstrated by the difference in their practical effects and that the approval of one would accomplish something independent of the approval of the other. For instance, the approval of the Exemption Request, even without the approval of the LAR, allows Entergy to make irradiated fuel management disbursements from the DTF after 30-days prior written notification. Similarly, the approval of the LAR, even without the approval of the Exemption Request, would allow Entergy to make decommissioning disbursements from the DTF without 30-days prior written notification after

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[90] 10 C.F.R. § 50.90.

[91] AEA § 189a.(1)(A).

[92] *See* Memorandum from Annette Vietti-Cook, Secretary, NRC, to E. Roy Hawkens, Chief Administrative Judge, Atomic Safety and Licensing Board Panel, Request for Hearing in the Matter of Entergy Nuclear Operations, Inc., Vermont Yankee Nuclear Power Station, Docket No. 50-271-LA-3 (Apr. 30, 2015) (ADAMS Accession No. ML15120A477).

[93] *Zion*, CLI-00-5, 51 NRC at 96.

decommissioning has begun. Therefore, despite Vermont's arguments to the contrary, neither the LAR nor the Exemption Request is "meaningless" without the other.[94]

Finally, that the LAR and Exemption Request are separate and independent is demonstrated by the fact that there is no specific order in which they must be granted. This is because, for the two requests, two different and unrelated safety findings have to be made. That is, the safety of the exchange of the license condition provisions for the regulations, in their entirety, has to be determined by the 10 C.F.R. §§ 50.90 – 50.92 license amendment process and the safety of the regulations, as exempted, has to be determined by the 10 C.F.R. § 50.12 exemption process. Based on this regulatory structure, the NRC review of the LAR properly does not re-evaluate the safety findings required for the Exemption Request (*i.e.*, it does not evaluate the safety of the regulations, *as exempted*) and the NRC review of the Exemption Request properly does not re-evaluate the safety findings required for the LAR (*i.e.*, it does not evaluate the safety of replacing the license condition provisions, in their entirety, with the regulations).

2. Case Law Provides that a Separate and Independent Exemption Request Cannot be Challenged in an LAR Proceeding

Since the Exemption Request is separate and independent from the LAR, the Exemption Request cannot be challenged in this proceeding on the LAR. This is supported by Federal and Commission case law interpreting the AEA, which has determined that there is no opportunity for a hearing on exemption requests unless an application for a license or license amendment is dependent on the granting of the exemption request for its own granting.

In *Commonwealth of Massachusetts v. NRC*, Massachusetts challenged, in part, the NRC's granting of an exemption requested by a licensee from an emergency planning

[94] Hearing Request at 20.

requirement.[95] The Court held that the granting of the exemption itself did not amend the licensee's license.[96] The Court reasoned that, since the same regulation which imposed the emergency planning requirement allowed for exemptions to it at 10 C.F.R. § 50.12, the exemption did not change the licensee's duty to follow NRC rules; it only changed which rule applied consistent with the rules themselves and, thus, there was no license amendment.[97] Subsequently, in *Zion*, the Commission endorsed this reasoning finding that, if a licensee requests an exemption pursuant to the Commission's regulations from requirements imposed by those same regulations, the granting of the exemption request does not change or amend the license or modify the Commission's regulations and "accordingly a hearing is not required . . ."[98] This is exactly the same situation as in the instant proceeding. Entergy submitted its Exemption Request to the NRC pursuant to 10 C.F.R. § 50.12, a provision within 10 C.F.R. Part 50, and requested to be exempted, in certain circumstances, from 10 C.F.R. § 50.75(h)(1)(iv) and 10 C.F.R. § 50.82(a)(8)(i)(A), which are also provisions within 10 C.F.R. Part 50. Therefore, consistent with *Commonwealth of Massachusetts v. NRC* and *Zion*, the Exemption Request does not amend the VY operating license and, thus, is not subject to a hearing.

Although exemptions, on their own, do not amend licenses and, thus, do not give rise to hearing opportunities, there is a limited instance in which exemption requests can be related to license applications or amendment requests in such a way that the hearing opportunity on the license application or amendment request encompasses the exemption request. This was recognized by the Commission in *PFS*. *PFS* involved an "Exemption Request Related to Initial Licensing"[99] where the exemption request sought an exemption "in the midst of a licensing

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[95] *Commonwealth of Massachusetts v. NRC*, 878 F.2d 1516, 1519 (1st Cir. 1989).

[96] *Id*. at 1521.

[97] *Id*.

[98] *Zion*, CLI-00-5, 51 NRC at 97-98.

[99] *PFS*, CLI-01-12, 53 NRC at 465.

proceeding" from "required elements of the license application process" that must be met "before the NRC can find the facility safe and license it."[100] The Commission ruled that, in such a situation, "[b]ecause resolution of the exemption request directly affects the licensability of the proposed [license application], the exemption raises material questions directly connected to an agency licensing action, and thus comes within the hearing rights of interested parties."[101] Subsequently, in *Honeywell*, the Commission used this same quote to support its statement that "when a licensee requests an exemption in a related license amendment application, we consider the hearing rights on the amendment application to encompass the exemption request as well."[102] Thus, the Commission's use of the term "related" to describe exemption requests that may be challenged in licensing proceedings refers to only those exemption requests that are necessary for licenseability. In the instant proceeding, however, the resolution of the Exemption Request does not directly affect the licensability of the LAR; instead, as explained above, the LAR is separate and independent from the Exemption Request. Consequently, the hearing opportunity on the LAR does not encompass the Exemption Request and, thus, Vermont's proposed Contention V again challenging the Exemption Request is outside the scope and immaterial to the instant proceeding.

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In conclusion, the basis for this proceeding is the LAR. Vermont attempts to challenge the LAR by arguing in its proposed Contention V: (1) that the LAR is inaccurate and incomplete for not referencing the now-granted Exemption Request and (2) that the LAR will result in the replacement of the VY decommissioning trust license condition provisions with the

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[100] *Id*. at 467 (emphasis omitted).

[101] *Id*. *See also id*. at 470 ("The proper focus is on whether the exemption is necessary for the applicant to obtain an initial license or amend its license. Where the exemption thus is a direct part of an initial licensing or licensing amendment action, there is a potential that an interested party could raise an admissible contention on the exemption, triggering a right to a hearing under the AEA.").

[102] *Honeywell*, CLI-13-1, 77 NRC at 10 n.37.

decommissioning trust regulations, *as exempted by the now-granted Exemption Request*, instead of in their entirety, contrary to 10 C.F.R. § 50.75(h)(5). Both of these arguments, though, are, in fact, challenges to the Exemption Request. Vermont is attempting to tie the Exemption Request with the LAR and create a linkage that does not exist. Instead, as demonstrated above, the LAR and the Exemption Request are separate and independent requests with separate and independent practical effects and to which separate and independent evaluations apply and, thus, there is no hearing opportunity on the Exemption Request under either *Zion* or *PFS*. Therefore, Vermont's proposed Contention V is necessarily outside the scope of this LAR proceeding and not material to the findings that the NRC must make on the LAR, in contravention of 10 C.F.R. § 2.309(f)(1)(iii) – (iv), and should be denied.

III. Vermont's Motion to Add Additional Bases and Support to its Existing Contentions I, III, and IV is Inadmissible

In its Motion, Vermont also asserts that the NRC's granting of the Exemption Request "provides . . . an additional basis for admission of [Vermont's] previous Contentions I, III and IV" because it "makes clear that, if [the] LAR is granted, Entergy will no longer be subject to any requirement of providing 30-day notice for withdrawals from the decommissioning trust fund not only for decommissioning expenses, but also for spent fuel management expenses . . . ."[103]

This "additional basis" is inadmissible for the same reason that Vermont's proposed Contention V is inadmissible, namely, it is a challenge to the NRC's safety findings related to the Exemption Request and not a challenge to the LAR. The action causing the exemption of VY from the Commission's regulatory 30-day notice requirement for spent fuel management withdrawals that Vermont is challenging with this argument is the NRC's granting of the Exemption Request. As an initial matter, though, challenges such as this to the NRC's review of applications rather than to the applications themselves are not permitted in NRC

[103] Motion at 7.

adjudications.[104] Moreover, a challenge to the Exemption Request itself would be inadmissible because the scope of this proceeding is confined to the LAR and because the findings that the NRC must make on the LAR are not dependent on the Exemption Request. Again, the relevant question with respect to the LAR is only whether exchanging the VY decommissioning trust license condition provisions, that have been found to be sufficiently protective of the public health and safety, with the decommissioning trust regulations, in their entirety, that have also been found to be sufficiently protective of the public health and safety, would be protective of the public health and safety under 10 C.F.R. § 50.92. Whether it would also be safe to apply the decommissioning trust regulations, *as exempted*, to VY is a separate and independent question that was addressed separately under the exemption process of 10 C.F.R. § 50.12. Therefore, consistent with *Zion* and *PFS*, Vermont cannot challenge the Exemption Request in this LAR proceeding and, thus, its motion to add "additional bases" should be denied.

CONCLUSION

For the reasons stated above, the Board should deny Vermont's Motion to file new and amended contentions after the deadline.

Respectfully submitted,

/Signed (electronically) by/

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Dated at Rockville, Maryland
this 31st day of July, 2015

[104] *Prairie Island*, CLI-10-27, 72 NRC at 493 n.56.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of	)	
	)	
ENTERGY NUCLEAR VERMONT YANKEE, LLC	)	
AND ENTERGY NUCLEAR OPERATIONS, INC.	)	Docket No. 50-271-LA-3
	)	
(Vermont Yankee Nuclear Power Station)	)	

CERTIFICATE OF SERVICE

Pursuant to 10 C.F.R. § 2.305, I hereby certify that copies of the foregoing "NRC STAFF'S ANSWER TO THE STATE OF VERMONT'S MOTION FOR LEAVE TO FILE NEW AND AMENDED CONTENTIONS," dated July 31, 2015, have been filed through the Electronic Information Exchange, the NRC's E-Filing System, in the above-captioned proceeding, this 31st day of July, 2015.

/Signed (electronically) by/

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